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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 576.

JOHN T. CALLAHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER

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Opinions Below.

The opinion of the District Court overruling a demurrer (R. 8-9) is reported *sub nom United States* v. *Newton* in 36 Fed. (2) 425. The opinion of the Circuit Court of Appeals (R. 146-150) is reported *sub nom Callahan* v. *United States,* 53 Fed. (2d) 467.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered October 29, 1931 (R. 151) and a petition for a rehearing denied November 27, 1931 (R. 151). The petition for certiorari was filed December 16, 1931 and the writ granted January 25, 1932. Petitioner invoked the jurisdiction of this Court under section 248 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether petitioner should have been prosecuted and sentenced under the National Prohibition Act instead of under Section 593(b) of the Tariff Act of 1922.

2. Whether the indictment spelled out an offense under section 593(b) of the Tariff Act of 1922.

3. Whether petitioner, guilty of a violation of the National Prohibition Act, may be sentenced under section 593(b) *of the Tariff Act of 1922.*

Statutes Involved.

The pertinent provisions of the Tariff Act of 1922 and the National Prohibition Act, as well as of the Willis-Campbell Act and the Jones Act, are printed in the Appendix.

Statement.

The petitioner was found guilty upon the first count of an indictment returned in the United States District Court for the District of Delaware, which purported to charge the importation of intoxicating liquor in violation of section 593(b) of the Tariff Act of 1922 (R. 3, 4). The count charged that certain named defendants, on November 10, 1927—

> "did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon, into the territorial waters of the District of Delaware * * * certain merchandise, contrary to law, to wit, a large quantity of intoxicating liquor, to wit * * * all of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the Provisions of Section 593, Subdivision B of the Act of Congress of Sep-

tember 21, 1922, known as the Tariff Act of 1922 * * *."

The count then alleged that the importation was illegal in that the merchandise was brought into the United States:

(*a*) Without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the Tariff Act of 1922.

(*b*) Without payment of the customs duties thereon as required by the aforesaid schedule.

(*c*) And in that said merchandise was imported and brought into the United States in violation of Section 3, Title II, of the National Prohibition Act.

In a separate paragraph of the count petitioner was charged with aiding and abetting the other defendants in the alleged offense (R. 4). The second count of the indictment was dismissed by the United States Attorney at the trial (R. 124).

A demurrer filed by the petitioner was overruled, the trial court holding that in so far as the allegations of paragraph (c) were concerned, the indictment stated an offense (R. 8-9).

The case, therefore, went to the jury upon the allegations of the first count charging the petitioner with aiding and abetting the importation of intoxicating liquor contrary to the provisions of Section 3, Title II, of the National Prohibition Act, and therefore "contrary to law." Petitioner was convicted (R. 136) and sentenced to the penitentiary for a year and a day and to pay a fine of $2,500 (R. 141).

POINT I.

The Court erred in refusing to dismiss the indictment on the ground that the same does not spell out an offense under Section 593(b) of the Tariff Act of 1922.

(a) The petitioner should have been prosecuted and sentenced under the National Prohibition Act instead of under section 593(b) of the Tariff Act of 1922.

(b) The indictment did not spell out an offense under section 593(b) of the Tariff Act of 1922.

The importation of intoxicating liquors contrary to the National Prohibition Act, Section 3, Title II thereof, is an offense created entirely by that statute. Section 593(b) of the Tariff Act of 1922 did not supersede the National Prohibition Act regarding importation, and though later in time, is not necessarily inconsistent therewith. Section 593(b) does not prohibit the importation of intoxicating liquors as does the National Prohibition Act. In fact, under Section 593(b) of the Tariff Act of 1922, intoxicating liquor may be imported if done so in accordance with Schedule 8. Consequently the Tariff Act of 1922 and any part thereof cannot be deemed to be inconsistent with the National Prohibition Act regarding the importation of intoxicating liquors, and to hold that it superseded the National Prohibition Act was error.

The Circuit Court in rendering its opinion relies in the main on the case of

Bookbinder v. *United States* (C. C. A. 3) 287 Fed, 790.

The Court holds a correct interpretation of this case to be that since it was decided prior to the passage of the Willis-Campbell Act, and while in the opinion in that case Judge

WOOLLEY suggested that the Prohibition Act may have repealed the provisions of the Tariff Act as it affected actual importation, the case was decided upon other provisions of the Tariff Act which were not affected by the unlawful importation provisions of the Prohibition Act. The Willis-Campbell Act was passed November 23rd, 1921. The *Bookbinder* case, *supra,* was decided March 13, 1923, two years later. The indictment in the *Bookbinder* case, however, was returned in September, 1921, but the opinion, nevertheless, discusses the force and effect of both the Willis-Campbell Act and the case of

United States v. *Stafoff,* 260 U. S. 477, 67 L. Ed. 358,

on the subject matter at hand.

But of paramount importance is the statement in the *Bookbinder* case, *supra,* found at page 794:

> "And the same difference maintains between the case of *United States* v. *McKenzie* (D. C.) 283 Fed. 667, and the case at bar. There the Court held that the identical section (R. S. Sec. 3082). was repealed by the National Prohibition Act. In that case the charges of the indictment were the importation, transportation, and the smuggling of liquors, all of which offenses the National Prohibition Act, the later statute, specifically denounces and for which it provides specific penalties. The *McKenzie* case differs from the case at bar in that it dealt with importation of liquor while the case at bar has to do with receiving and concealing liquor unlawfully imported. About this the National Prohibition Act says nothing."

It would seem that the reasoning of the Circuit Court of Appeals in this Circuit in the *Bookbinder* case is controlling notwithstanding the passage of the Willis-Campbell Act or the decision of this court in the *Stafoff* case.

The fact that the merchandise involved is intoxicating liquor, the importation of which was prohibited by the National Prohibition Act, created an offense which did not exist under the old laws, and therefore the supplemental act did not change the complexion of Section 593(b) of the Tariff Act of 1922. The language of the Willis-Campbell Act, and as this Court has observed in its opinion wherein it cites the holding of the United States Supreme Court in the *Stafoff* case, shows beyond doubt that the supplemental act refers only to

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws, that were in force when the National Prohibition Act was enacted shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act."

It follows that such enactment cannot be invoked in the present case for the law involved herein is *Section 593(b) of the Tariff Act of 1922 which is not a law regarding "the manufacture and taxation of and traffic in intoxicating liquor."*

It is too clear for argument that Section 593(b) of the Tariff Act of 1922 does not relate to the manufacture or taxation of intoxicating liquor. It is quite apparent too that it does not relate to traffic in intoxicating liquor. The word "traffic" is defined in

> *Bouvier's Law Dictionary,* Rawle's Third Revision, Volume 3 at page 3307

as follows:

> "Traffic. Commerce; trade; sale or exchange of merchandise, bills, money, and the like. The passing

> of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who traffics or a trader, a merchant. *Senior* v. *Ratterman,* 44 Ohio St. 673, 11 N. E. 321."

It is contended that the learned Circuit Court of Appeals has mistaken the force and effect of the decision of this Court in the *Stafoff* case, and has broadened the holding of that case beyond its scope. The *Bookbinder* case, *supra,* is still the law of this Circuit and is not in conflict with the *Stafoff* decision.

But assuming without conceding that section 593(b) is a law regarding traffic in intoxicating liquor, nevertheless there is the same direct conflict between it and sections 3 and 29 of the National Prohibition Act as between section 3450 of the Revised Statutes and section 26, which were held to be in direct conflict to the extent of the penalty provision. So, too, are sections 3 and 29 directly in conflict with section 593(b).

> *Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 74 L. Ed. 1016.

Accordingly the penalty provision of section 593(b) does not continue in force. (Section 593[b] stems back to Revised Statutes, section 3082.)

It is respectfully submitted that the Circuit Court erred in its construction of the case of

> *Gillespie* v. *United States* (C. C. A. 2), 13 Fed. (2d) 736,

regarding which the Circuit Court states as follows (R. 148):

> "An importation takes place whenever merchandise is brought within the territorial waters of the United States with intent to illegally bring said merchandise into the country."

The Court in the case, *Gillespie* v. *U. S., supra,* at page 737, states:

> "Plaintiffs-in-error, however, are not accused of 'running' this liquor, or of any offense under the National Prohibition Law; nor does that statute have any connection with their crime; except to render the bringing into the United States of the whisky in the manner above described unlawful, for reasons not necessarily having a connection with revenue."

The Court goes on to say:

> "The statute relied upon, and above quoted, does not speak of smuggling; the statutory words in section 593(b) are to *'bring into* the United States.' It is in section 593(a) that punishment is prescribed for one who 'smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced,' etc."

And at page 738 of the case the Court expressly shows the circumstances under which Section 593(b) may be invoked for an unlawful importation of intoxicating liquors by definitely and conclusively stating as follows:

> "In fact, all the whisky still on the tug, while it was not yet smuggled, was in the United States and unlawfully brought there, because, as charged in the indictment, it was brought in without a permit."

This case is distinguishable from ours on the common grounds with the case of

> *Keck* v. *United States,* 172 U. S. 434, 43 L. Ed. 505,

which reversed the lower Court and dismissed an indictment for the identical absence of an allegation of the

alleged illegality of the importation. A similar situation presents itself in our case where there is an absence of a statement in the indictment that the liquor was aboard the vessel within the territorial waters of the United States without a permit.

Yet the *Gillespie* case wherein the Court holds as *supra* cited that the goods would be brought into the United States contrary to law, does not hold that that would be contrary to Section 593(b) and it is conceded, and we argue and contend for the fact that it would be contrary to law but contrary only to the National Prohibition Act which condemns such importation. That this construction of the *Gillespie* case is a true one is apparent in the Court's statement relied on at page 738 where it states:

> "The first count in the *Keck* case was based on R. S. Sec. 3082 (Comp. St. Sec. 5785), substantially identical with section 593(b) of the Tariff Act of 1922. That count was held insufficient—and there was no dissent on this point—because of the failure to specify in the indictment in what way the importation was contrary to law. In the indictment before us it is specifically charged in the allegation that the importation was without the required permit."

Furthermore, in the *Gillespie* case the charge against the defendants was facilitating the transportation, concealment, etc., of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law. This is not an offense under the National Prohibition Act. The Court does not pass upon the point involved in our case, and so much of the ruling as is dicta, is unquestionably in support of our contention. The real gist of the holding of the *Gillespie* case may be found at page 738:

> "However inartistic the indictment in this case may be, it is clear that it was intended to charge the offense created by section 593 (b), and not that created by section 593(a). These defendants are not charged with having smuggled the goods, or with being accessories to the smuggling; they are charged with having facilitated the transportation of the goods after they had been smuggled, and with knowledge that they had been brought into the country contrary to law."

In that respect the indictment was treated identically as it was in the *Bookbinder* case, *supra.*

The National Prohibition Act does not denounce concealment or facilitation in transportation after illegal importation of intoxicating liquor.

The case of

McGill v. *United States,* 28 Fed. (2d) 572

seems determinative. The same considerations of the indictment and the proof govern here as in the *McGill* case, *supra,* and in

Keck v. *United States, supra.*

Can it with reason be held that if there were a permit to import the liquor in question that the facts nevertheless would substantiate a violation of Section 593(b) of the Tariff Act of 1922 in the absence of a showing that opportunity had been afforded for the payment of duties and that a customs barrier had been passed without such payment? In short, importation under the Tariff Act is not synonymous with or identical to importation under the National Prohibition Act. Under the former, merchandise at a definite point and within a definite time must be properly declared, and upon failure to comply, upon the passing

of a customs barrier, the act of importation is complete. Under the latter, a mere carriage of intoxicating liquors for beverage purposes into the territorial waters of the United States without a permit incurs liability under Section 3, Title II of the National Prohibition Act. No more has been shown than the coming into the territorial waters of the United States of a vessel upon which there was a cargo of intoxicating liquor (R. 51-54, fols. 68-71). The demurrer to the indictment was sustained in so far as the indictment referred to any acts other than the act of coming within the territorial waters with a cargo of intoxicating liquors.

The indictment having been stripped by the District Court's decision (R. p. 8, fol. 12) sustaining so much of the demurrer as refers to (1) the importation as contrary to law in that it was made without a permit from the Commissioner of Internal Revenue, (2) without payment of the customs duties thereon as required by Schedule 8 of the Tariff Act of 1922, leaves nothing except the allegation that the importation was in violation of Section 3, Title II of the National Prohibition Act. There is no general prohibition against the importation of intoxicating liquors in the Tariff Act. In fact, intoxicating liquors may be imported. In all the authorities found, whenever Section 593(b) of the Tariff Act of 1922 was invoked, there was present in the indictment and in the proof, facts showing the character of the violation directly contrary to some specific provision of the Tariff Act. *In that respect the case at bar is distinguishable from all those authorities, regardless of how they may be construed, for in none of them was there simply and solely an alleged illegal importation by virtue of the violation only of Section 3, Title II of the National Prohibition Act.*

Kurczak v. *United States*, 14 Fed. (2d) 109;
United States v. *Cardwell*, 9 Fed. (2d) 146;
Nounes v. *United States*, 4 Fed. (2d) 833;
Bookbinder v. *United States, supra.*

It is respectfully urged that Congress intended that a fine be imposed of $500 as a maximum for the importation of intoxicating liquors on the dates specified in the indictment (November 10, 1927). That under the circumstances of this case and under the indictment as reduced by the Court's ruling on the demurrer, that the violation of law, if any, was a prohibition violation and that Congress has imposed the penalty in Section 29 of the National Prohibition Act. To invoke under circumstances such as these, in the face of an indictment such as this, Section 593 (b) of the Tariff Act of 1922 is to subvert the direct command of Congress as expressed in Section 3, Title II of the National Prohibition Act and to invoke a more severe penalty by reason of the artifice of a pleader who has invoked a tariff regulation which Congress had no intent of using in a fact situation as presented here.

And too, the arrest was made of persons in the act of transporting intoxicating liquor in violation of law and the vessel seized (R. 51-54, fols. 68-71). The mandatory provisions of Title 2, Section 26 of the National Prohibition Act govern.

Richbourg Motor Co. v. *United States, supra.*

That section provides inter al:

> "Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; * * *"

The applicable provision "of this chapter" is found in Title 2, Section 3 thereof, which relates to the offense of importation.

As stated in the *Richbourg* case, by Mr. Justice STONE:

> "No tenable ground of distinction is suggested which would enable us to say, where forfeiture is involved, that the preceding requirement of the section, that the proceedings against the person arrested 'shall be under the provisions of this title,' is any less so."

If, in the case at bar the mandatory provisions of section 26 do not control, nevertheless the National Prohibition Act (Sections 3 and 29) is paramount by reason of the inconsistency between it and section 593(b) of the Tariff Act—just as section 3450 and section 26 are inconsistent, the latter being less drastic and treating specifically with intoxicating liquor.

In the case of

United States v. *Dowling*, 278 Fed. 630,

the Court at page 641 discusses the effect of the passage of the Volstead Act on the existing statute, Section 3082 of the Revised Statutes which is substantially identical to Section 593(b) of the Tariff Act of 1922. The Court at page 641, states:

> "The fifth and sixth grounds of demurrer to count No. 4 of indictment 1424 show an additional reason why it is insufficient. These grounds are:
>
> "'(5) Section 3082 of the Revised Statutes of the United States, as applied to intoxicating liquors for beverage purposes, has been repealed by the Eighteenth Amendment to the Constitution and the National Prohibition Act.
>
> "'(6) Section 3082, of the Revised Statutes of the United States, as applied to intoxicating liquor for beverage purposes, has been superseded by the National Prohibition Act.'

"Considering these grounds of demurrer, I think the passage of the Volstead Act impliedly repealed section 3082 of the Revised Statutes. It is noted that the Volstead Act is a later act than sec. 3082 and that the Volstead Act imposes penalties of less severity than those imposed by section 3082. In the case of *U. S.* v. *Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 66 L. Ed. ....; the holding was as follows:

" 'Existing penal statutes are repealed by later ones covering practically the same acts, but fixing lesser penalties.'

"Also see *U. S.* v. *Windham* (D. C.) 264 Fed. 376.

"Section 3082 is the smuggling statute, and it imposes a penalty of $5,000 and two years' imprisonment upon any one found guilty of knowingly assisting in smuggling. Section 3 of the Volstead Act prohibits importation of intoxicating liquors, and section 29 provides that, for violations where a special penalty is not provided, the punishment shall be a fine of not more than $500. So the ground is fully covered by the Volstead Act, as it is a later statute, and as the penalty prescribed by it is less than that prescribed by section 3082, R. S. section 3082 would also appear to come within the provisions of section 35 of the Volstead Act, which provides for the repeal of conflicting acts to the extent of the conflict."

And in the case of

Bruno v. *United States*, 289 Fed. 649,

the Court at page 656 states:

"It is evident that the infractions of law denounced in section 3082 as 'contrary to law' are those defined in the provisions of the customs laws (*U. S.* v. *McKenzie* (D. C.) 283 Fed. 667, 668), not those defined in the National Prohibition Act, and

that, if the defendant was found guilty under the first two counts of violating section 3 of title 2 of the Prohibition Act, such violation was not an infraction of section 3082. It is also evident that the punishment provided for a violation of section 3 of title 2 is found in section 29 of that title, and is less than that provided in section 3082. It follows that the defendant could not lawfully be tried and sentenced under counts 1 and 2 for a violation of section 3, as a violation of that section is not an act denounced by section 3082, and the punishment provided for such violation in section 29 is less than that provided in section 3082. We therefore regard the first two counts as bad."

For cases of like import see

United States v. *Puhac,* 268 Fed. 392;
United States v. *Turner,* 266 Fed. 248;
Reed v. *Thurmond, United States Attorney,* 269 Fed. 252.

As stated in

United States v. *Turner, supra,* at p. 251:

"When the identical offense denounced by an old statute under a heavy punishment is by a more recent statute made punishable with less severity, there is inconsistency. The intent shown by the recent statute is repugnant to and contradictory of an intent to keep in force the old statute."

This Court in

United States v. *Ryan,* 76 L. Ed. ...., Adv. Opinions No. 3, page 71 at page 75

held:

"All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever

> a reasonable application can be given which is consistent with the legislative purpose. *United States* v. *Katz*, 271 U. S. 354, 70 L. ed. 986, 46 S. Ct. 513; * * *."

That the National Prohibition Act was intended to suppress the entire traffic in intoxicating liquor as a beverage appears from this Court's own opinion in

> *United States* v. *Katz*, 271 U. S. 354, 70 L. ed. 986, 46 S. Ct. 513,

and in

> *Grogan* v. *Hiram Walker & Sons*, 259 U. S. 80, 89, 66 L. Ed. 836, 839.

If section 593(b) has any force and effect to a transaction involving intoxicating liquors it can only refer to persons authorized under the provisions of the National Prohibition Act to deal in such intoxicating liquors.

> *United States* v. *Katz*, *supra*.

That the *Stafoff* case was no authority for the proposition that the Willis-Campbell Act placed a new complexion on the applicability of section 593(b) to a liquor violation appears from this Court's own statement in the opinion in that case at page 361 as follows:

> "There remain the questions certified in *Brooks* v. *United States*. They are somewhat broader than we indicated in our summary statement, as they include the revenue laws generally as well as the sections 3258, 3281, and 3282. The general question manifestly is too broad to require an answer."

As stated by this Court in

> *United States* v. *Yuginovich*, 256 U. S. 450, 65 L. Ed. 1043, at 1046:

"It is well settled that in cases of this character the construction or sufficiency of the indictment is not brought before us. *United States* v. *Keitel,* 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; *United States* v. *Stevenson,* 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35. For the purpose of interpreting the statute we adopt the meaning placed upon the indictment by the Court below. *United States* v. *Colgate & Co.,* 250 U. S. 300, 63 L. ed. 992, 7 A. L. R. 443, 39 Sup. Ct. Rep. 465. As that Court evidently construed the statutes upon the assumption that the charges had relation to intoxicating liquors intended for beverage purposes, we shall follow that view of the indictment in determining whether the former statutes are still in force.

"Section 35 (in the margin) in its first sentence repeals all prior acts to the extent of their inconsistency with the National Prohibition Act,—to that extent and no more,—* * *"

It is evident from the holdings in *Dowling's* and *Bruno's* cases, *supra,* that the Court has interpreted the intent of Congress in passing the Volstead Act to be that such enactment was to make the act all-dominant and controlling so far as relates to the importation of intoxicating liquors. It appears illogical to assume that the Volstead Act which particularly relates to intoxicating liquors shall have been superseded by the Tariff Act of 1922 which is all-embrasive in its intendment.

We respectfully contend that the words "contrary to law," as used in Section 593(b) of the Tariff Act of 1922 means contrary to some law which itself does not prescribe a penalty. It has no reference to any law which if violated prescribes the punishment therefor. This is particularly true where Congress as here, created the offense in Section 3, Title II of the National Prohibition Act and has imposed

the punishment for the violation. Furthermore, "contrary to law," as used in this said section and as held by this Court in this opinion refer to Section 3, Title II of the National Prohibition Act as being the law contrary to which the alleged importation was committed.

It is elementary that the facts of an indictment govern; that the pleader's nomination of a particular statute does not render the indictment invalid if such statute does not cover the fact situation. The Court nevertheless will proceed to sentence if a conviction is obtained under the applicable statute.

Williams v. *United States,* 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509.

The indictment herein names Section 593(b) on a fact situation (after demurrer) which can only refer to the National Prohibition Act. Of course, the statement in the indictment "the said defendants then and there well knowing that such merchandise was so imported and brought into the United States as aforesaid," which immediately succeeds the statement, "in that said merchandise was then and there by said defendants imported and brought into the United States in violation of Section 3, of Title II of the National Prohibition Act," means exactly what it states, and that is to say, that the importation was in violation of the National Prohibition Act. The interpretation and construction of "contrary to law," as used in Section 593(b) of the Tariff Act of 1922 may be correct, and yet this indictment in its language does not support such construction.

Section 593(b) of the Tariff Act does not fix a special penalty for the importation of intoxicating liquor. It does not deal specifically with intoxicating liquor. In fact, im-

portation of intoxicating liquor is not prohibited under the Tariff Act of 1922. It is only the importation of merchandise in general to which the Tariff Act of 1922, Section 593(b) thereof, relates. On the other hand, the National Prohibition Act prohibits not the importation in general of merchandise but specifically of intoxicating liquor. It prescribes and fixes a penalty therefor. The penalty, like many others for violations of the terms of the National Prohibition Act, is found in Section 29 thereof. Indeed, if there were no penalty imposed under the National Prohibition Act for the importation of intoxicating liquors, the importation thereof would be no offense, for there can be no offense without a penalty.

United States v. *Seibert*, 2 Fed. (2d) 80.

If the National Prohibition Act was superseded with regard to importation of intoxicating liquors by Section 593(b), then there is no additional force and effect created by the Jones Act which raises the punishment for the illegal importation of intoxicating liquors to five years' imprisonment and a fine of $10,000 and directs that the change be effective in regard to the National Prohibition Act without in any manner referring to Section 593(b) of the Tarff Act of 1922. The only extent to which Section 593(b) can be held to have superseded the National Prohibition Act is in reference to offenses which Section 593(b) specifically create and which are not to be found in the National Prohibition Act—otherwise, both statutes would be inconsistent.

POINT II.

The sentence of the Trial Court was erroneous and void by reason of Section 29 of the National Prohibition Act which governs.

(a) The petitioner, in effect, was found guilty of a violation of the National Prohibition Act.

(1) The contention here made is that, assuming without conceding, that the indictment in the case at bar has in it all the ingredients essential to constitute the offense of importation denounced by the National Prohibition Act, that the sentence of the Court imposing a fine and imprisonment of one year and a day against the defendant was void, at least in so far as it exceeds the penalty imposed under the terms of the National Prohibition Act, Section 29. It has already been pointed out that Section 593(b) is a general statute which imposes a penalty for the importation of merchandise in general contrary to law. It is urged that "contrary to law" as used in Section 593(b) means contrary to such laws which do not provide for the imposition of a penalty for their infraction. Section 593(b) of the Tariff Act of 1922 is a general statute fixing a punishment therein for the violation of laws or enactments governing and controlling the manner in which merchandise in general may be brought into the United States. The failure to have a permit, the failure to pay duties as prescribed, and the failure to properly mark packages and stamp them, all of which are prescribed by law, and for none of which a penalty for the violation of which is prescribed: these are the laws which Section 593(b) may be invoked to impose its sanction upon, but for the violation of a statute which creates an offense and imposes a penalty—for such offenses it is contended that

Section 593(b) may not be invoked unless it can be construed to be a repealer of such other statute or unless the intent of Congress can be gleaned from the two statutes under consideration and the later statute interpreted as superseding the former one.

The National Prohibition Act denounces an illegal importation of intoxicating liquors. It prescribes the penalty therefor under Section 29 thereof.

In the case of

Baily v. *Allan E. Walker,* 2 Fed. (2d) 123 at page 124

we find this canon of statutory construction which applies to the case at bar:

> "It is elementary in the interpretation of statutes that specific provisions relating to a given subject shall prevail over more general ones relating to a class of which the particular subject is but a part, unless the context or some other proper basis of construction clearly shows a different legislative purpose."

See also:

United States v. *Zenith Radio Corp.,* 12 Fed. (2d) 614.

In the case of

Simon v. *Simon,* 26 Fed. (2d) 530,

at page 532, the Court holds:

> "It is a canon of statutory construction that, where there is an earlier special statute and a later general statute, the terms of the later being broad enough to include the matter provided for in the former, the special statute must be considered as

an exception to the general statute. *Ex parte Crow Dog,* 109 U. S. 556, 570, 3 S. Ct. 396, 27 L. Ed. 1030; *Rodgers* v. *United States,* 185 U. S. 83, 87, 88, 89, 22 S. Ct. 582, 46 L. Ed. 816."

That Congress clearly intended that Section 3 of Title 2 of the National Prohibition Act be applied to the illegal importation of intoxicating liquors becomes an unassailable fact when viewed in the light of the language of the Jones Law. By that enactment which in point of time was seven years later than the Tariff Act of 1922, we find Congress effected a change in the sanction under Section 29 with respect to, among other things, a prosecution for the importation of intoxicating liquor. By this enactment the penalty imposed for the offense of importation under the National Prohibition Act was increased to a fine not to exceed $10,000 or imprisonment not to exceed five years or both. To say that Congress intended the Tariff Act of 1922, Section 593(b) thereof to be used in a prosecution for an illegal importation of intoxicating liquor is to refuse to recognize the expression of the intent of Congress as exhibited in the Jones Act *supra.* Congress never intended the Tariff Act of 1922 to impose a sentence or a penalty for the illegal importation of intoxicating liquors in violation of the National Prohibition Act. As late as 1929 Congress, in enacting the Jones Law, was satisfied that the National Prohibition Act imposed a penalty for importation of intoxicating liquors. To hold, as the Trial Court did in this case, that Section 593(b) of the Tariff Act of 1922 superseded Section 29 on the ground that a specific penalty for the illegal importation is provided for in Section 593(b) is in effect a holding that importation of intoxicating liquors under the National Prohibition Act is no offense.

See

United States v. *Seibert, supra.*

Furthermore, under the Tariff Act of 1922, Paragraph 801, Schedule 8, which provides for the import duties on spirits, wines and other beverages reads as follows:

> "Nothing in this Schedule shall be construed as in any manner limiting or restricting the provisions of Title 27 (The National Prohibition Act, as amended)."

This is an unequivocal expression of the intent of Congress that the Tariff Act of 1922 should affect its own field of legislation and in no manner trespass upon the terms of the National Prohibition Act.

Unless a punishment is provided, a statute does not create a crime. Furthermore, the Jones Act would be utterly ineffective with respect to importation of intoxicating liquor if the Court below was correct. Anyone commercializing on a large scale the importation of intoxicating liquors who would be indicted under the Jones Act for such importation could argue on the basis of the Court's decision in this case, that with respect to the importation of intoxicating liquors, the Tariff Act of 1922, Section 593(b) superseded importation under the National Prohibition Act and the penalty therefor. It would also follow that the Jones Act was a nullity so far as importation is concerned by reason of the fact that it effects a change in a statute, already superseded. In this connection another well-established canon of statutory construction effectively comes into play. We find it well stated in the case of

Washington Railway, etc. v. *District of Columbia,* 10 Fed. (2d) 999, at page 1001:

> "It is a well established rule that repeals by implication are not favored, and that a general statute without negative words, will not repeal the particular provisions of a former statute, unless the two acts are irreconcilably inconsistent."

At this point let us revert to Point I of this brief in which the respective roles to be played by Section 3, Title 2 of the National Prohibition Act, and Section 593(b) have been pointed out. The latter statute may be invoked as an aid to the enforcement of the National Prohibition Act, when coupled with the illegal importation, there is the receipt and concealment thereof after importation. To hold that Section 593(b) may be invoked for the illegal importation of intoxicating liquor, providing its illegality is shown to be in violation of the Tariff Act of 1922, in which case 593(b) may be deemed to be co-extensive in its application with Section 3, Title 2 of the National Prohibition Act does not dispose of the problem in the case at bar for the reason that the indictment failed to incorporate in it any illegality embraced by the terms of the Tariff Act of 1922 after the demurrer to it had been interposed.

The statement in the indictment that the acts complained of were contrary to Section 593(b) of the Tariff Act of 1922 is a conclusion of the pleader and may be disregarded, and if the facts in the indictment are sufficient to state a cause of action and sufficiently inform the accused of the nature of the charge against him, such an indictment will be sustained under the proper statute applicable thereto.

Harper v. *U. S.*, 27 Fed. (2d) 77 at page 79:

> "The fact that the pleader has misstated the number of the section is immaterial, it being suffi-

cient if the language fully states an offense denounced by the federal statutes. *Johnson* v. *Biddle* (C. C. A.) 12 F. (2d) 366 at 369; *Taylor* v. *U. S.* (C. C. A.) 2 F. (2d) 444. In the latter case it is held that reference by number to the wrong section of the Criminal Code as the one under which the indictment is brought does not affect or defeat the indictment. An indictment is nothing more than a pleading, and its sufficiency must be determined by the facts therein set forth. The statement that the facts violate a certain section of the statute is nothing more than the pleader's conclusion, which may or may not be correct, and neither adds nor detracts from the allegations."

If the indictment can be justified at all, it can only be under the terms of the National Prohibition Act. The sentence therefore, upon conviction of the defendant should have been imposed under and in accordance with the terms of Section 29 of the National Prohibition Act. In imposing a sentence of imprisonment when the said section imposes at maximum a fine of $500, the Trial Court imposed a void sentence as it was without jurisdiction in doing so.

To raise an offense from the degree of a misdemeanor to that of a felony, Congress must specifically by statute state its intention so to do.

Under the National Prohibition Act, importation of intoxicating liquor prior to the Jones Act, was a misdemeanor, the punishment therefor being at maximum the fine of $500. Section 29, Section 541, Title 18, U. S. C. A., Cr. Code Sec. 335. If Section 593(b) may be invoked, a sentence of two years or a fine of $10,000 or both may be incurred. The violation of this statute, therefore, constitutes a felony. Nothing in Section 593(b) indicates any intention on the part of Congress to raise the crime of importing intoxicating liquors to the degree

of a felony. It was a misdemeanor up until specific legislation changing it into a felony was enacted by the Jones Act, *supra*.

See:

Ross v. *U. S.*, 37 Fed. (2d) 557.

(2) A conviction under an indictment based on a violation of the Prohibition Act and a sentence under Section 593 (b) of the Tariff Act are inconsistent.

The Court, in holding that Section 593(b) superseded so far as the penalty is concerned, Section 29 of the National Prohibition Act regarding importation of liquor was in error. For the purpose of this point, counsel will assume that Section 593(b) did effect a change in the law with regard to the importation of intoxicating liquors. Thus it will not be contended here that Section 593(b) found as it is in a separate body of law, wholly apart from and independent of the National Prohibition Act cannot, in the absence of a specific reference to the later statute, effect a change, even though it was enacted subsequent in time, and it will not at this time be contended that the raising of the sanction and the status of the offense from a misdemeanor to a felony or an infamous crime, cannot be accomplished without an unequivocal expressed intent found in the language of the enactment itself. But it will be entirely assumed, without conceding, that the Court was correct in its holding that penalties imposed under 593(b) superseded Section 29, and counsel wishes to point out to this Court the inevitable consequences that follow from such a holding in the light of the authorities on the subject.

The leading authority is the case of

United States v. *James Tynen*, 20 L. Ed. 153, 11 Wall. 88-95.

The pertinent language is as follows:

"There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is given effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *Davies* v. *Fairbairn*, 3 How. 636; *Bartlett* v. *King*, 12 Mass. 587; *Com.* v. *Cooley*, 10 Pick. 37; *Pierpont* v. *Crouch*, 10 Cal. 315; *Norris* v. *Crocker*, 13 How. 429; Sedgw. Stat. Law, 126.

"Now, between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes the punishment for the offenses designated, imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the Court; it thus permits what the first law prohibits.

"Again, the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this, also, it permits what the first act forbids.

"Again; the act of 1813 declares that the fine, when imposed, shall not be less than $500. The act of 1870 allows the fine to be as low as $300, thus authorizing what the first act declares shall not be done.

"When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated.

"One of the earliest cases on this subject is that of *Rex* v. *Cator*, reported in 3 Burrows, 2026. There were two English statutes against enticing and seducing artificers in the manufactures of the kingdom into foreign service. The penalty under the first statute was, for the first offense, a fine of 100 pounds and three months' imprisonment; for the second offense, the fine was discretionary and imprisonment for twelve months. Under the second statute the penalty was, for the first offense, a fine of 500 pounds and twelve months' imprisonment; for the second offense the fine was 1000 pounds and two years' imprisonment. The latter act, said Lord Mansfield, seems to be a repeal of the former act; it was made to supply the deficiencies of the former. Accordingly, the defendant, who had been convicted under both statutes, was sentenced under the last. In *Rex* v. *Davis*, 1 Leach (C. C.) 271, it appeared that there were two statutes against killing deer in an inclosed park. The first statute made the offense a felony punishable with death. The last statute punished the first offense with a fine, and made the second offense a felony; and the twelve judges were unanimously of opinion that the last statute amounted to a repeal of so much of the first as related to the offense of felony.

"There are numerous cases in the modern reports to the same effect. We will cite only one, which was decided in this Court, that of *Norris* v. *Crocker*, 13 How. 429. In that case the defendants were sued in an action of debt to recover the penalty of $500 upon the 4th section of the act of Congress of February, 1793 (1 Stat. at L. 302), respecting fugitives from justice, and persons escaping from the service

of their masters. That section provided that any person who should, knowingly and willingly, obstruct or hinder the claimant, his agent or attorney, in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent or attorney when arrested by the authority given by the act, or should harbor or conceal him, after notice that he was a fugitive from labor, should forfeit and pay for each of these offenses the sum of $500, to be recovered by the claimant in an action of debt.

"Pending the action brought under this section against the defendants, Congress, in 1850 (9 Stat. at L. 462) passed an act amendatory of and supplementary to the act of February, 1793, the 7th section of which embraces the offenses specified in the act of 1793, and creates new offenses, and affixed to each a different punishment from that named in the old act, prescribing a fine not exceeding 1000 pounds, and imprisonment not exceeding six months upon indictment and conviction of the offender, and declaring that the offender shall also forfeit, and pay, by way of civil damages, to the party injured, the sum of $1000 for each fugitive lost, to be recovered by action of debt. The act of 1850 contained no clause repealing, in terms, the act of 1793, and the counsel of the government contended that it only added cumulative remedies, and was intended to give greater facilities to the master of the slave in securing the fugitive, and could not be construed to have a retrospective operation and wipe out liabilities incurred under the old act, and thus deprive the master of rights of action in suits pending that had accrued to him; and that the Court would not favor repeals by implication. But the Court held unanimously, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, observing also that, as a general rule, it was 'Not open to controversy, that when a new statute covers the whole subject of an old one,

adds offenses, and prescribes different penalties for those enumerated in the old law, that the former statute is repealed by implication, as the provisions of both cannot stand together.'

"By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed. In *Norris* v. *Crocker* the Court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the Court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case: 'The repeal of the law imposing the penalty is of itself a remission.' *Md.* v. *R. Co.*, 3 How. 534. In the case at bar, when the 13th section of the act of 1813 was repealed, there was no offense remaining for the Court to punish in virtue of that section."

It follows therefore, that 593(b), in consequence of the holding of the Court, if it is correct, acts as a repeal of the National Prohibition Act with respect to the importation of liquor. If that be so, the judgment of conviction based as it is in this case, on the violation of a statute, to wit, the National Prohibition Act, Section 3, Title 2 thereof, which has been repealed, if the holding of the Court is correct, must be set aside.

The case of

United States v. *Tynen, supra,*

compels such conclusion. The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions started and concluded while it was an existing law.

Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264;
Norris v. *Crocker*, 13 How. 429, 14 L. Ed. 210.

It is significant to note that the indictment charges that the illegality consisted of the importation of liquors contrary to Section 3, Title 2 of the National Prohibition Act. If that act has been repealed, there can be no illegality in the importation of the intoxicating liquors. It follows, therefore, from the assumption that the Court is correct in its holding, that the importation of intoxicating liquor could not have violated the National Prohibition Act if that act was repealed by Section 593(b). The judgment of conviction can be justified only in the holding that the National Prohibition Act, Section 3, Title 2, was in force and effect at the time, and not repealed, and that the penalty thereunder provides for a maximum fine of $500 in accordance with Section 29.

Respectfully submitted,

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Appendix.

Section 593(b) of the Tariff Act of 1922 (19 U. S. C. Sec. 497):

Fraudulently or knowingly importing or assisting in importing merchandise; buying, selling, transporting, or concealing unlawfully imported merchandise; punishment. If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000, nor less than $50, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.

Paragraph 813 of Schedule 8 of the Tariff Act of 1922:

No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.

Section 3 of the National Prohibition Act (27 U. S. C. Sec. 12):

Manufacture, sale, transportation, importation or exportation, delivery, furnishing, or possessing intoxicating liquors prohibited; exceptions. No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: *Provided,* That nothing in this chapter shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

Section 29 of the National Prohibition Act (27 U. S. C. Sec. 46):

Punishment for unlawful manufacture or sale of liquor or violation of permits. Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this chapter, or violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more

than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this chapter against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

Section 26 of the National Prohibition Act (27 U. S. C. Sec. 40):

Unlawful transportation of liquor; seizure and destruction of liquor and sale of vehicle. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any persons in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the

officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 5 of the Willis-Campbell Act (Nov. 23, 1921, c. 134, Sec. 5, 42 Stat. 223, 27 U. S. C. Sec. 3):

Effect on existing legislation. All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws, that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

Jones Act, entitled "An Act to amend the National Prohibition Act," as amended and supplemented (27 U. S. C. Sec. 91):

Maximum penalties; petty offenses. Wherever a penalty or penalties are prescribed in a criminal prosecution by this title, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 4 of this title, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That any person who violates the provisions of this title, in any of the following ways: (1) by a sale of not more than one gallon of liquor as that word is defined by section 4 of this title: *Provided, however,* That the defendant has not theretofore within two years been convicted of a violation of this title or is not engaged in habitual violation of the same; (2) by unlawful making of liquor, as that word is defined by said section, in an amount not exceeding one gallon, in the production of which no other person is employed; (3) by assisting in unlawfully making or unlawfully transporting of liquor, as above defined, as a casual employee only; (4) by unlawfully transporting not exceeding one gallon of liquor, as above defined, by a person not habitually engaged or employed in, or not theretofore within two years having been convicted of a violation of such law, shall for each offense be subject to a fine of not to exceed $500 or to be confined in jail, without hard labor, not to exceed six months, or both.

(27 U. S. C. Sec. 92);

Minimum penalties. Section 91 shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense provided by this title.